IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 1367 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THAKORE KANTIJI @ KANTIBHAI ATMARAM & 2 - Applicant(s)

Versus

STATE OF GUJARAT - Respondent(s)

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Appearance :

MR. Y.V. BRAHMBHATT for Applicant(s) : 1 - 3.
MR. R.M.CHAUHAN, ADDL.PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 17/02/2006

ORAL JUDGMENT

By this application, under Section 437 (6), read with Sections 439 and Section 482 of Criminal Procedure Code, 1973, the applicants make following main prayer.

*"**(A)** Your Lordships may be pleased to enlarge the petitioners on bail in connection with I C.R.No.68*

of 2005 registered at Kalol Taluka Police Station on 29/3/2005 for the offences punishable under Sections 379 and 120-B of the Indian Penal Code and under Section 3 (7) of Essential Commodity Act and under Section 5 (7) of Public Property Damages Act and in connection with Criminal Case No.954 of 2005 registered at Court of learned J.M.F.C., Kalol and Criminal Case No.574 of 2006 which is re-numbered at Gandhinagar Court of 5th Additional Senior civil Judge and J.M.F.C., Gandhinagar. Be pleased to quash and set aside order dated 4/2/2006 passed by learned Sessions Judge, Gandhinagar."

2. At the outset, it may be noted that the applicants are facing charges for the offences punishable under Sections 379, 120 (B) of Indian Penal Code and under Section 3(7) of Essential Commodities Act and under Section 5 (7) of the Damages to Public Property Act. They are in custody since 23/3/2005. They had earlier preferred Bail applications, which have been rejected, even after charge-sheet. Successive Bail applications have been preferred earlier, which have not found favour of the Court, either they are rejected or withdrawn.

2.1 The applicants had preferred Criminal Misc. Application No.13789 of 2005, claiming bail by virtue

of provisions of Section 437 (6) of Criminal Procedure Code. That application was preferred without approaching the Magisterial Court, and therefore, was withdrawn on 5/12/2005.

2.2 Subsequent to withdrawal of the said application, the applicants approached learned J.M.F.C., Kalol, praying for bail on the ground that the trial has not been concluded within 60 days of first recording of evidence. The said application came to be rejected by the learned J.M.F.C., Kalol by order dated 17/12/2005.

2.3 The above order was challenged by the applicants by preferring Criminal Revision Application before the Sessions Court, bearing No.6 of 2006 under Section 397 of Criminal Procedure Code. Learned Principal Sessions Judge, Gandhinagar by order dated 4/2/2006, dismissed the Revision Application. However, he directed the case to be transferred to the Court of 5th Additional Senior Civil Judge and J.M.F.C., Gandhinagar, with a further direction that the case shall be listed on day to day basis starting from 6/2/2006 till conclusion of the trial in the second sitting each day and that trial should be completed, as early as possible.

3. After the above order, present application is preferred by the applicants under Section 437(6), 439 and 482 of the Criminal Procedure Code, wherein, the prayer in respect of bail, as well as, for quashing and setting aside the order of the Sessions Court, is made.

4. As per statement made at the Bar by learned Advocate, for the applicants, the applicants were arrested on 23/3/2005. That charge was framed against them on 25/8/2005 and first evidence was recorded on 6/9/2005. It is also stated at the Bar by learned Advocate for the applicants that subsequent to the order of the Sessions Court, the trial has proceeded further and witnesses have been and are being examined.

5. Learned Advocate, Mr.Brahambhatt, appearing for the applicants submitted that provisions contained in Section 437(6) are mandatory in nature and, if the learned Magistrate is of the opinion that Bail is not to be granted, he has to record reasons therefor.

5.1 Learned Advocate, Mr.Brahambhatt, submitted that the reasons recorded by learned Magistrate, are not adequate and the Sessions Court while considering the

Revision Application, has not examined, whether the reasons are adequate or not. Mr.Brahambhatt, submitted that the offence with which the applicants are charged are punishable maximum with an imprisonment upto 5 years. He also submitted that the trial may not be concluded in near future, as there are 43 witnesses to be examined and, therefore, this Bail application may be granted.

5.2 Mr.Brhambhatt, has placed reliance on following decisions.

i) 2000 Cr.L.J. 807 S.C. in the matter of Sandeep Jain Vs. National Capital Territory of Delhi.

ii) 2000 (3) Crimes 388 M.P. High Court, in case of Ram Kumar @ Raj Kumar Rathore Vs. State of M.P.

iii) Unreported order passed in Special Criminal Application No.476 of 2005 dated 17/10/2005 by this Court (Coram: R.P.Dholakia, J.)

5.3 No other contentions are raised and no other case law is cited on behalf of the applicants.

6. Learned Addl. Public Prosecutor, Mr.Chauhan, has opposed this application. He submitted that this is a

successive Bail application. There is no change in circumstance. He submitted that the Sessions Court has already directed for expeditious disposal of the case and the trial is in progress and, therefore, this application may not be entertained.

7. The contentions raised by learned Advocate, Mr.Brahambhatt, that the Sessions Court has not examined the question whether the reasons adopted by the learned J.M.F.C., while rejecting the application of the applicants under Section 437 (6) of Criminal Procedure Code are adequate or not cannot be examined by this Court, while exercising bail jurisdiction.

8. However, when this application is preferred under Section 437 (6) read with Section 439 and 482 of Criminal Procedure Code, the contentions raised by learned Advocate are independently examined in the interest of justice, though they have already been so examined by the Sessions Court in Revision Application.

9. It is clear from the reading of Section 437 that the provisions contained in Sub-section 6 though mandatory leave an option with the Magistrate in not following

the mandate, if he indicates reasons for so doing. Upon reading the order of the learned Magistrate, it is clear that learned Magistrate has assigned reasons for not accepting the application and not granting bail to the applicants. It appears that the delay was caused not because of any fault either on part of the prosecution or the Court. Section 413 of Indian Penal Code came to be added and that offence being triable by the Court of Sessions and case was committed to the Court of Sessions. This happened on 19/9/2005. The said order adding Section 413 was challenged by way of a Revision Application in the Court of Sessions, which came to be allowed and the order was set aside by order dated 10/10/2005. On that order being communicated, the trial was fixed for further recording of evidence on 29/10/2005 and thereafter, witnesses have been examined on 17/11/2005, 18/11/2005 and on 19/11/2005. The witnesses appear to have been cross-examined at length on behalf of by the criminal defendants, where learned Magistrate has observed that the depositions run in 15 pages, 27 pages, etc.. It is also recorded by the learned Magistrate that the accused persons themselves are responsible to some extent in causing delay in conclusion of the trial by tendering various

type of applications. These observations make it abundantly clear that the Magistrate has recorded reasons for the delay, so also, reasons for not granting Bail to the applicants, under Section 437 (6) of Criminal Procedure Code, as well as on merits, as their case has been considered on merits on earlier occasion even by this Court.

10. The judgments relied upon by learned Advocate for the applicants may be now considered.

10.1 In case of **Sandeep Jain reported in 2000 Cr.L.J. 807 (S.C.)**, the question was whether an order requiring the accused to pay Rs.2 Lacs at the F.I.R. stage was justified and the Hon'ble the Apex Court held that it was onerous, in view of the fact that the offence alleged against accused were under Sections 420 and 406 of the Indian Penal Code. The question raised before this Court, are not the same as before the Apex Court.

10.2 In case of **Ram Kumar @ Raj Kumar Rathore reported in 2000 (3) Crimes 388 M.P. High Court**, it has been held that the provisions under Section 437(6) is mandatory and that reasons has to be recorded by the

Magistrate for not following the mandate. There cannot be any second opinion on this aspect. What is further observed in the said judgment is on facts of that case and judgment therefore cannot be of any help to the applicants here, as learned Magistrate has recorded adequate reasons for not considering case of the applicants for bail under Section 437(6) of Criminal Procedure Code.

10.3 In case of **Chetan Jagdishchandra Bhatt, unreported order passed by a Coordinate Bench of this Court in Special Criminal Application No.476 of 2005, on 17/10/2005**, at the outset, it may be noted that the Court was not exercising its bail jurisdiction, although question of bail was under consideration. In that order, the petitioner was granted Bail on conclusion that there is no likelihood of the trial being proceeded further in near future and in peculiar facts of that case. In the instant case before this Court, trial has already commenced and is ordered to be proceeded with on day to day basis by the Court of learned 5th Additional Senior Civil Judge and J.M.F.C., Gandhinagar and it is also not in dispute that thereafter the matter has proceeded expeditiously and

witnesses have been examined. By no stretch of imagination, can the present case be equated with the case, being Special Criminal Application No.476 of 2005, which was before a Coordinate Bench of this Court. No principle of law is laid in that order which may be binding precedent to this court. The decision is rendered on facts and in circumstances of the case. It may not help the applicants.

10.4 Therefore, none of the judgments relied upon by the learned Advocate, for the applicants can help the applicants.

11. What therefore now emerges is that the application under Section 437 (6) of Cr.P.C., preferred by the applicants is rejected by learned Magistrate, after recording adequate reasons. The said order was challenged before the Sessions Court and the Revision Application before the Sessions Court, came to be rejected. By virtue of order of the Sessions Court, the trial has proceeded almost on day to day basis expeditiously and witnesses are being examined. Learned Magistrate, while rejecting application has in terms recorded that accused themselves are also to some

extent responsible for delay in conclusion of trial and last but not the least, the applicants' case for Bail on merits has been considered and reconsidered and answered in negative. As regards the prayer for quashing and setting aside the order of Sessions Judge, sufficient it is to record that the order was passed by the Sessions Court in exercise of revisional jurisdiction and, cannot be re-examined by this Court, while exercising Bail jurisdiction.

12. In light of above facts situation, this application cannot be entertained and stands rejected.

(A.L.DAVE, J.)

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